

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 6, 2000

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 99-196 |
| Petitioner | : | A.C. No. 42-02113-03539 |
| | : | |
| v. | : | Willow Creek Mine |
| | : | |
| PLATEAU MINING CORPORATION, | : | |
| Respondent | : | |
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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | |
| Petitioner | : | |
| | : | |
| v. | : | |
| | : | |
| JOHN A. PESARSICK, employed by | : | Docket No. WEST 99-422 |
| Plateau Mining Corp., | : | A.C. No. 42-02113-03546 A |
| Respondent | : | |
| | : | |
| JOHN D. TRACKEMAS, employed by | : | Docket No. WEST 99-423 |
| Plateau Mining Corp., | : | A.C. No. 42-02113-03547 A |
| Respondent | : | |
| | : | |
| KELLY BURNHAM, employed by | : | Docket No. WEST 99-446 |
| Plateau Mining Corp., | : | A.C. No. 42-02113-03545 A |
| Respondent | : | |

**ORDER GRANTING THE SECRETARY OF LABOR'S
MOTION FOR PARTIAL SUMMARY DECISION**

These proceedings involve one citation issued by the Secretary of Labor under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 814(d)(1) alleging a violation of 30 C.F.R. § 75.363(b).¹ The parties entered into stipulations and asked that I

¹ Docket No. WEST 99-196 also involved two section 104(a) citations, but by order dated January 10, 2000, I approved the parties' proposed settlement of those citations.

determine whether Plateau Mining Corporation (“Plateau”) violated the safety standard based on the stipulated facts. The parties state that whether a violation occurred is basically a legal issue because the facts surrounding the alleged violation are not disputed. I agree that the issue presented by the parties can be resolved based on the stipulations, the pleadings, and the arguments of the parties. For the reasons set forth below, I find that the Secretary established a violation. This order does not resolve these cases because I do not make any findings or conclusions with respect to the civil penalty criteria, the unwarrantable failure allegation, or the allegation that the individual respondents knowingly authorized, ordered, or carried out the violation.

I. CITATION, SAFETY STANDARD, AND STIPULATED FACTS

Citation No. 7625090, issued September 1, 1998, states, in pertinent part:

The On-Shift Mine Examiner for the D-1 Long Wall 001-0 MMU, Willow Creek Mine, Kelly Burnham, Long Wall Foreman, on 8/26/1998, during required On-Shift Examin[ations], did not list all hazardous conditions incurred. A methane/Coal Dust, and/or Hydrocarbon ignition occurred at approximately 19:30 hours on the D-1 Long Wall 001-0 face. The ignition is a hazardous condition. Hazardous condition[s], or combination of hazards existed to cause an ignition. At the end of each shift hazardous conditions shall include nature and location, and corrective action taken. The ignition lasted approximately 45-60 seconds, and extinguished by Shear’s Fire Suppression system, and 10 pound Fire Extinguisher. The mine operator did not immediately contact MSHA

Section 75.363 provides, in part, as follows:

Hazardous conditions; posting, correcting and recording.

(a) Any hazardous conditions found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected....

(b) A record shall be made of any hazardous condition found. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition is

found and shall include the nature and location of the hazardous condition and the corrective action taken. This record shall not be required for shifts when no hazardous conditions are found or for hazardous conditions found during the preshift or weekly examinations inasmuch as these examinations have separate recordkeeping requirements.

Subsections (c) and (d) set out detailed record keeping requirements including who must make the record and who must countersign the record. The parties entered into the following stipulations, in pertinent part:

2. The parties are submitting these stipulations with the intention of filing cross motions for summary decision of whether a violation existed with respect to Citation No. 7625090. ... If it is found that a violation existed, the issues of the appropriate penalty for the operator and whether Messrs. Pesarsick, Trackemas, and Burnham committed knowing violations of the cited standard, would remain.

3. [T]he Secretary alleges that the operator failed to record in the on-shift book an ignition which occurred at approximately 19:30 hours on the D-1 Longwall 001-0 fact on August 26, 1998.

* * * *

5. The ignition lasted approximately 45-60 seconds and was extinguished by the longwall machine's fire suppression system and a 10-pound fire extinguisher operated by one of the operator's employees.

6. Kelly Burnham, at all relevant times, was the longwall foreman at the Willow Creek Mine and was responsible for the operation of the longwall production unit. Mr. Burnham was the individual who made the entry in the on-shift report for the longwall section on the afternoon shift on August 26, 1998. Mr. Burnham did not make an entry in the on-shift report concerning the ignition, nor did anyone else.

7. The ignition occurred during the afternoon shift on August 26, 1998. That shift worked from about 2:00 p.m. until midnight. Burnham was not in the vicinity of the ignition when it occurred.

8. Mr. Burnham was not present on the longwall face when the ignition referenced in the citation occurred. He was in the bleeder entries at the time. When he returned to the face, the longwall crew

reported to him that an ignition of some sort had occurred, but Mr. Burnham did not observe the ignition.

9. Jack Trackemas was the mine manager at the Willow Creek Mine.

10. Mr. Trackemas first learned of the ignition late in the evening of August 26, 1998, but prior to the end of the afternoon shift, through a telephone call from Mr. Pesarsick.

11. John Pesarsick, at all relevant times, was the shift supervisor at the Willow Creek Mine.

12. Mr. Pesarsick was on the surface in the Conspec Room when the longwall headgate shearer operator reported that an ignition had occurred around the tailgate of the longwall.

13. Mr. Trackemas, Mr. Pesarsick, and Mr. Burnham are “certified persons” as that term is used in 30 C.F.R. § 75.363(b). They agree that any decision in these matters upon summary decision as to the fact of violation with respect to Citation No. 7625090 would apply to them in Docket Nos. WEST 99-422, 99-423, and 99-446. They do not agree that, if a violation is found to have existed, that they knowingly authorized, ordered, or carried out any violation found to have occurred.

14. In conclusion, the parties submit that the issue of whether a violation occurred is a legal issue; specifically, whether “found” as used in the cited standard (30 C.F.R. § 75.363(b)) encompasses circumstances where a hazardous condition becomes known to a certified person by a report or whether “found” is limited to circumstances where the hazardous condition is personally observed or discovered by the certified individual.

II. SUMMARY OF THE PARTIES’ ARGUMENTS

The Secretary contends that three certified persons at the mine found a hazardous condition that had not been reported in the preshift or weekly examination books and they failed to report it in the required record book, hereinafter, the “on-shift book.” The hazardous condition was the ignition in the longwall that occurred at about 19:30 on August 26, 1998.

The Secretary maintains that the language of the safety standard makes clear that the certified person does not have to personally observe the hazardous condition in order for the requirements of the safety standard to apply. The Secretary argues that if a miner tells a certified

person about a hazardous condition at a mine, the certified person must record the hazard in the on-shift book, if he agrees with the miner that the condition presented a hazard. She contends that, in this case, all three certified persons became aware of the hazardous condition before the end of the shift and that a violation occurred because the condition was never recorded in the on-shift book. The Secretary notes that there is no indication in this case that Plateau failed to record the condition because it did not consider the condition to be hazardous. Rather, the operator did not record the hazardous condition because no certified person personally observed the condition.

The Secretary also contends that the preamble to the regulation supports her interpretation that the word “found” in the safety standard does not require personal observation by the certified person. She argues that the interpretation urged by Plateau is directly contrary to the intent of the standard which is to prevent injuries by requiring the posting and recording of hazardous conditions to ensure that it is corrected.

Plateau maintains that the language of the standard only requires the reporting of incidents that are “found” by the designated mine officials. That is, unless one of the certified persons set forth in subsection (a) of the standard finds the hazardous condition, the condition is not required to be recorded in the on-shift book. It argues that its interpretation is supported by the posting requirement because the certified person must be at the site of the hazardous condition to either post the hazard or to take steps to have the condition immediately corrected. Plateau also points to the preamble to the regulation to support its argument. Plateau contends that the Secretary’s interpretation of 75.363 must be rejected because it is at variance with the plain language of the standard.

III. DISCUSSION WITH CONCLUSIONS OF LAW

The issue in this case revolves around the meaning of the word “found” in subsections (a) and (b) of the safety standard. It appears that this is an issue of first impression. The regulation states that any hazardous condition “found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons” must be posted and a record of the condition and corrective action must be made in the on-shift book. For purposes of this order, I will use the term “certified persons” when referring to this list of persons. The standard does not say who must first discover the hazardous condition. In most cases, if a miner first discovers a hazardous condition, he would likely report it to a certified person, who would then go examine the condition. If, in that situation, the certified person determines that the condition is hazardous, I believe that the standard requires that the condition be recorded. The mere fact that someone other than a certified person first discovered the condition would be irrelevant. Because of the nature of the hazardous condition in this case, a certified person did not personally observe the condition. I believe that this fact should not defeat the purpose of the standard.

I agree with Plateau that the word “found” as used in subsection (a) of the standard is ambiguous, especially because it is followed by the titles of very specific individuals to whom the term is to be applied. Thus, I do not agree with the Secretary that the regulation is clear on its

face. The word “found” is fraught with difficulty because it can be used in so many different ways. The term “find” has an adjudicatory meaning, it can mean “to happen upon,” or it can mean to “learn” or “discover.” The term is too ambiguous to have a clear meaning in the context of the safety standard.

If the terms of a safety standard are ambiguous, the Commission must defer to the Secretary’s reasonable interpretation of the regulation, unless it is plainly erroneous or inconsistent with the regulation. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *Island Creek Coal Co.*, 20 FMSHRC 14, 18 (January 1998). The legislative history of the Mine Act provides that “the Secretary’s interpretations of the law and regulations shall be given weight both by the Commission and the courts.” S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 637 (1978). I conclude that the Secretary’s interpretation is reasonable and is consistent with the objectives of the Mine Act.

The fact that none of Plateau’s certified persons observed the ignition because they were not in the longwall face at the time does not mitigate the need to record the incident in the on-shift book. They were informed of the ignition before the end of the shift and Mr. Burnham made at least one entry in the on-shift book that day, but he did not record the ignition. The on-shift book, along with the records for the pre-shift and weekly examinations, provides important information to mine operators. This information can be used to improve the safety and health of miners. These books can also be used by MSHA to monitor conditions at a mine. Whether a hazard is recorded in the on-shift book should not depend upon the location of an operator’s certified persons at the time of the incident.

Plateau relies on the posting requirement in subsection (a) to support its argument. It contends that if the certified person is not present when the hazardous condition is found he cannot post the area to prevent entry or immediately correct the condition so the hazard no longer exists. This argument is not well taken. As stated above, in most instances once the hazardous condition is reported to the certified person, he can go to the area and take whatever remedial measures are necessary. In the instant case, the issue as to whether the hazardous condition required posting is not before me. In any event, a certified person could have traveled to the longwall face and made that determination.

Each party relies on the regulatory history of the standard to support its position. When the standard was first proposed, the first sentence of subsection (a) read, in pertinent part: “Any hazardous conditions found by, or reported to, the mine foreman” (59 *Fed. Reg.* 26396, May 19, 1994)(emphasis added). Plateau contends that the deletion of the highlighted language evidences the Secretary’s clear intent that if a hazardous condition is reported to a certified person rather than observed by the certified person, it need not be recorded in the on-shift book.

I find that the preamble provides an explanation for this change. Several comments that were filed with MSHA suggested that the “or reported to” language in the proposal could be

interpreted to mean that the certified person would be required to record and post the condition even if he did not believe that a hazard was present. The preamble states:

Under the proposal, hazardous conditions reported to [certified persons] would have required posting. Commenters suggested that requiring [the posting of] hazardous conditions “reported to” these individuals would eliminate the judgment of the persons responsible for making decisions about whether or not a hazardous condition exists. One commenter suggested that the requirement, as proposed, could undermine the integrity of the certified person.

(61 *Fed. Reg.* 9802, March 11, 1996). The proposal was revised to delete the “or reported to” language based on these comments. The preamble goes on to state: “MSHA would expect that when a hazardous condition is reported to these certified persons, that the measures necessary to evaluate the situation and, if necessary, comply with the provisions of this section would be taken.” *Id.*

I conclude that the preamble supports the Secretary’s interpretation of the standard. The “as reported to” language was removed to make clear that it is the certified person who decides whether a hazardous condition exists, not individual miners. I reject Plateau’s argument that this language was removed because MSHA “did not want to require the recording of hazardous incidents that are ‘reported to’” certified persons. (P. Motion 8). Plateau also relies upon the language in the preamble that states that “MSHA would expect” certified persons to evaluate a condition reported to them so they can determine if the requirements of the standard “would be taken.” It maintains that the “would expect” language shows that MSHA merely entertained a “hope” that mine operators would post and record hazardous conditions reported to a certified person. *Id.* I hold that the use of the word “expect” does not detract from the Secretary’s interpretation of the standard. The preamble makes clear that she requires conditions that are reported to a certified person to be recorded and posted or corrected if the certified person determines that a hazardous condition was present.

I find, based on the stipulations and pleadings, that there is no genuine issue as to any material fact and that the Secretary is entitled to partial summary decision on the issue presented to me. The issue presented is whether Plateau violated section 75 75.363(b) as alleged in Citation No. 762090 and my finding in this regard applies to the individual respondents.²

IV. ORDER

Based on above, the Secretary's motion for partial summary decision is **GRANTED** and Plateau's motion for summary decision with respect to Citation No. 762090 is **DENIED**. The parties shall confer for the purpose of attempting to resolve the remaining issues. If a settlement cannot be reached, the parties shall discuss proposals for resolving the remaining issues. In either event, counsel for the Secretary shall initiate a conference call to discuss the cases on or before **April 21, 2000**.

Richard W. Manning
Administrative Law Judge

² In its response to the Secretary's motion for partial summary decision, Plateau states:

Respondents did not stipulate that the ignition was specifically a "hazardous condition" as contemplated by the standard. It occurred and was immediately extinguished. A question exists as to whether an already corrected condition constitutes a "hazardous condition" for the purpose of the standard.

(P. Response 3, n. 2). If it is Plateau's position that it did not violate the safety standard even if a certified person found the cited ignition, as the term "found" is interpreted by Plateau in this case, then the stipulations and cross-motions for summary decision serve no purpose. If Plateau believes that the ignition did not create a hazardous condition, then whether a certified person was present at the time of the ignition is irrelevant. Although Plateau did not specifically stipulate that the ignition presented a hazardous condition, it did stipulate that the stipulations and cross-motions were filed so that the judge could determine "whether a violation existed with respect to Citation No. 7625090." (Stip. 2). It further stipulated that "[i]f it is found that a violation existed, the issues of the appropriate penalty for the operator and whether Messrs. Pesarsick, Trackemas, and Burnham committed knowing violations of the cited standard, would remain." *Id.* Finally, the parties stipulated that "the issue of whether a violation occurred is a legal issue" involving an interpretation of the word "found." (Stip. 14). There is no indication that, if I grant the Secretary's motion for summary decision, Respondents could then challenge the citation in subsequent proceedings on the basis that no hazardous condition existed. Such an interpretation is at odds with the terms of the stipulations that I decide whether there was a violation based on the stipulated facts and cross-motions.

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